No. 96-795

In The

# Supreme Court of the United States

October Term, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF OF PETITIONER ON THE MERITS

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## QUESTION FOR REVIEW

Whether the National Labor Relations Board erred in holding that a successor employer cannot conduct a poll to determine whether a majority of its employees support a union unless it already has obtained so much evidence of no majority support as to render the poll superfluous?

## PARTIES TO THE PROCEEDING

In addition to Allentown Mack Sales and Service, Inc.[1] and the General Counsel of the National Labor Relations Board, the parties to the Board proceeding included Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO. The Union did not participate before the United States Court of Appeals for the District of Columbia.

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[1] Allentown Mack is not publicly traded and has no parent or subsidiaries.



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The Court of Appeals' decision is reported at 83 F.3d 1433, 152 L.R.R.M (BNA) 2257 (D.C. Cir. 1996) (Appendix A to Petition for Certiorari). The National Labor Relations Board's decision, including the Administrative Law Judge's decision, is reported at 316 N.L.R.B. 1199, 149 L.R.R.M. (BNA) 1051 (1995) (Appendix B to Petition for Certiorari).

## JURISDICTION

The Court of Appeals issued its decision on May 21, 1996. The Court of Appeals denied Allentown Mack's Petition for Rehearing and Suggestion for Rehearing In Banc on September 13, 1996 (Appendix C to Petition for Certiorari). On November 19, 1996, Allentown Mack filed a petition for a writ of certiorari with the United States Supreme Court and on March 3, 1997 the Court granted the writ. (JA 1, 65.)

The Court has jurisdiction under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) and 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 7 of the National Labor Relations Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

> concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157.

Section 8(a)(1) of the Act states, "It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

Section 8(a)(5) of the Act states, "It shall be an unfair labor practice for an employer – (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5).

## STATEMENT OF THE CASE

In May of 1990, Mack Trucks, Inc., notified the manager of its truck sales and service branch in Allentown, Pennsylvania, of its intention to sell the branch. (JA 20, Pet. App. 32-33.) The branch manager, Robert Dwyer, and two other managers formed Allentown Mack Sales and Service, Inc., to bid for and purchase the assets of the business and operate it as an independent dealership. (JA 20-21, Pet. App. 32.) The sale was effective December 21, 1990. (Pet. App. 35.)



In the year before the sale, Mack Trucks, a global business, earned $1.8 billion dollars in revenues. (JA 15.) The pre-sale revenues for the Allentown branch were $90-100 million, based on sales of about 2400 trucks per year. The new Company's projected revenues were a fraction of that amount – about $9 million per year, based on sales of about 90 trucks per year. (JA 14, Pet. App. 39.) The chief reason for this revenue reduction was that Mack Trucks did not sell to Allentown Mack the ability to make fleet sales, but transferred that work to other Mack Trucks branches. (Pet. App. 39.) In addition, the sale took place in a slow market caused by a several year recession in the trucking industry. (JA 15.)

The new Company did not hire all of the service and parts employees previously employed by Mack Trucks. The new Company hired 32 out of 45 of them. (Pet. App. 39-40.) Those who were hired accepted reduced pay, with an assurance that as the Company grew, "the employees would also grow with us." (Tr. 340-41.)

Local Lodge 724, International Association of Machinists and Aerospace Workers, AFL-CIO, had represented employees of Mack Trucks' service and parts departments at the branch since 1973. (JA 5, Pet. App. 28.)

During the period immediately before and after the sale, seven employees made statements to the owner/managers and other supervisors that the National Labor Relations Board accepted as proof that they no longer supported the Union. (Pet. App. 2, 13.) Those employees expressed rational reasons for no longer wishing to be represented. For example, Milt Solt thought that the Union was a waste of $35 per month, the amount he paid

in dues. (JA 41, Pet. App. 50.) Joe McKilvie said he was against the Union and that "we would work better without one." (JA 47, Pet. App. 50.)

A number of other employees made statements that the Board refused to consider as evidence of loss of support. Kermit Bloch, who had been a night shift mechanic for Mack Trucks, expressed disapproval of the union in his job interview and also told a supervisor, on another occasion, "that the entire night shift did not want the Union." (JA 48-49, Pet. App. 51.) Although Bloch's statements were counted as evidence that he did not support the Union, the Board refused to credit them as evidence supporting Allentown Mack's doubt that the night shift employees supported the Union. There were five or six employees on the night shift. (*Id.*)

Ron Mohr, a member of the Union's bargaining committee and shop steward of the service department, where 23 of the 32 employees worked, told branch manager Dwyer, "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." (JA 25-26, 38-39, Pet. App. 53-54.)

Four other employees made statements that the Board refused to count for other reasons.[2]

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[2] Dennis Marsh said he was not being represented for the $35 he was paying in monthly union dues. The Board found that this "seems more an expression of a desire for better representation than one for no representation at all." (JA 57, Pet. App. 51.)

Mike Ridgick was discounted because he was a manager at the time he stated his opposition to the Union in a job interview for a bargaining unit job. (Pet. App. 48.) The Board found that his status as a manager made his statement less reliable than other employees' statements made in job interviews, which the Board counted.

Dennis Wehr's opposition to the Union was not counted because he quit on January 23, 1991, two days before the Company sent its January 25, 1991 letter to the Union. The employee who apparently replaced him, Randy Zoltack, said the union was a waste of $35 (the amount of dues). He was not counted because he was hired after January 25, 1991, even though he was employed at the time of the poll. (JA 57-58, Pet. App. 49, 51.)



On January 7, 1991, the new Company received from the Union a demand for recognition and bargaining. (Pet. App. 30.) On January 25, 1991, the Company wrote back declining to enter into bargaining, "at least until further investigation," because it had a good faith doubt as to the Union's continued majority support. The letter further stated that in order to ascertain the employees' views concerning the Union, the Company had arranged for an independent secret ballot poll to be taken on February 8, 1991. (Pet. App. 30.)

A Roman Catholic priest conducted the poll of the employees. (JA 31-33, Pet. App. 14, 58.) The results were 19 to 13, against Union representation. (Pet. App. 14.) The Union responded, on February 12, 1991, that it did not recognize the results of the poll and that it intended to pursue legal remedies. (Pet. App. 44.) Thereafter, the Union filed an unfair labor practice charge against the Company. The Union did not petition the Board to hold an election.

On January 24, 1992, the Administrative Law Judge issued a decision finding that although the poll was conducted in a lawful manner[3] (Pet. App. 59-60), the Company was not entitled to conduct the poll in the first place because it did not meet the Board's "good faith reasonable doubt" standard for polling employees.[4] (Pet. App. 55-56.) As the ALJ wrote, "This reasonable doubt must be based on sufficient objective considerations to justify withdrawal of recognition from an incumbent union." (Pet. App. 45.) The ALJ found that six or seven out of 32 employees made statements "which could be used as objective considerations supporting a good-faith reasonable doubt as to continued majority status by the Union." (Pet. App. 52.) Accordingly, the ALJ found that the Company violated Sections 8(a)(1) and 8(a)(5) of the Act by conducting the poll and by refusing to recognize the Union based on the poll results. (Pet. App. 56.)[5]

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[3] The poll satisfied the procedural safeguards set forth in *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967) and *Texas Petrochemicals*, 296 N.L.R.B. 1057 (1989), *remanded as modified*, 923 F.2d 398 (5th Cir. 1991).

[4] The Board's standard was most fully explained in *Texas Petrochemicals Corp., supra.*

[5] The ALJ acknowledged, in a footnote, that three Courts of Appeals require less evidence of disaffection for the Union than the Board, but expressed "doubt" that the level of disaffection he credited would meet the lesser standard. The ALJ did not, however, consider the evidence under the lesser standard. (Pet. App. 53, n.7.)



On April 12, 1995, more than three years after the ALJ's Decision and more than four years after the withdrawal of recognition, the Board affirmed the ALJ, on slightly modified grounds.[6] (Pet. App. 19-28.).

The Board adopted the ALJ's approach to the "good faith reasonable doubt" standard, which consisted of a head count, counting an employee as anti-union only if he made a statement that the Board accepted as unequivocal proof of opposition to the Union. (Pet. App. 22-24.) As the ALJ observed, that is the same test the Board uses to determine if an employer can lawfully withdraw recognition from a union. (Pet. App. 45.) The Board, like the ALJ, did not consider the evidence cumulatively.

The Court of Appeals, in a 2-1 decision, enforced the Board's decision. Acknowledging that the Board's standard "has its faults" (Pet. App. 8), the Court of Appeals majority declined to follow three other Courts of Appeals which have rejected the Board's standard. *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Indus. Inc. v. NLRB*, 687 F.2d 863 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981). Those courts allow polling to determine if a majority of employees continue to support a union if there is substantial objective evidence of loss of union support, even if that evidence is not sufficient by itself to justify withdrawal of recognition. The Court of Appeals' decision

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[6] The Board found that the Company violated only Section 8(a)(1) of the NLRA by conducting the poll, not Section 8(a)(5). (Pet. App. 26 n.9.) The Board adopted the ALJ's finding that the withdrawal of recognition violated both sections. (Pet. App. 25-26.)

was accompanied by a vigorous dissent. (Pet. App. 13-18).

## SUMMARY OF ARGUMENT

The Board's standard for employer polling is not entitled to deference because it is irrational and contrary to the Act. Although polls are preferable to unilateral withdrawals of recognition, the Board irrationally sets the same standard for both. The Board defends its standard for employer polling by arguing that it should be consistent with the standard for Board-conducted elections based on employer petitions (RM petitions). However, the standard for RM petitions is also the same as the standard for withdrawals of recognition, which is equally irrational. The result of the Board's standard is that an employer can poll only when there is no need to do so.

The Board permits polling during the organizational phase because it is relevant to the union's claim for recognition. Polling is equally relevant to a successor employer faced with a claim for recognition. Section 8(a)(1) should not discriminate between polls in which unions stand to gain and polls in which they stand to lose because Section 7 places the right to engage in union activity and the right to refrain on an equal footing.

Although the Board continues to cite "good faith doubt" as the applicable standard, its application of the standard requires proof, via a head count, of actual loss of majority support. The Board's practice is an unacknowledged departure from its own precedent. If good faith doubt, as opposed to proof of loss of support,



is the standard, there was sufficient evidence to conduct a poll in this case.

## ARGUMENT

### I. LEGAL BACKGROUND

#### A. Successorship and withdrawals of recognition.

Under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), a union that represented the employees of an asset seller is presumed to represent the employees of the buyer, if a majority of the employees hired by the buyer previously worked for the seller. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Int'l Security Serv., Inc.*, 406 U.S. 272 (1972). The new employer can rebut the presumption of majority status and withdraw recognition by showing (1) that the union did not in fact enjoy majority support or (2) that the employer had a good faith doubt, founded on a sufficient objective basis, of the union's majority support. *Harley-Davidson Transportation Co.*, 273 N.L.R.B. 1531 (1985) (good faith doubt test applied to successor). *See also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990) (test applied to non-successor); *Celanese Corp. of America*, 95 N.L.R.B. 664, 673 (1951) (same).

A withdrawal of recognition must be made in a timely manner, before a contract bar comes into effect.[7]

[7] When a collective bargaining agreement is in effect, the Board will not entertain a petition. A contract bar can last up to three years. *Auciello Iron Works, Inc. v. NLRB*, ___ U.S. ___, 116 S. Ct. 1754 (1996).

*Auciello Iron Works, Inc. v. NLRB*, ___ U.S. ___, 116 S. Ct. 1754 (1996). A withdrawal of recognition can be based on the results of a poll. *See, e.g., Paper Board Cores, Inc. of Ala.*, 292 N.L.R.B. 995, 1001-02 (1989).

Although the Board continues to cite the words of the good faith doubt branch of its withdrawal of recognition standard, *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 788, n.8, it has in practice eliminated the good faith doubt branch in favor of a strict head count. The Board's "preoccupation with a head count requirement is evident." *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990).[8] As one commentator has observed, "there is often a significant disparity between the Board's articulated adjudicative standard and its application of that standard." Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U.L.Rev. 387, 394 (1995) (hereinafter, *"Hiding the Ball"*). The commentator continued:

> A thorough review of withdrawal of recognition case law . . . reveals that circumstantial evidence, no matter how abundant, is rarely, if ever, enough to satisfy the good-faith doubt test. In practice, the Board deems the test satisfied only if the employer has proven that a majority

[8] Examples of the Board's preoccupation with a head count are numerous. *See, e.g., Alcon Fabricators*, 317 N.L.R.B. 1088 (1995); *Phoenix Pipe & Tube*, 302 N.L.R.B. 122, *enf'd*, 955 F.2d 852 (3d Cir. 1991); *Johns-Manville Corp.*, 289 N.L.R.B. 358 (1988), *enf. den.*, 906 F.2d 1428 (10th Cir. 1990); *Tube Craft, Inc.*, 289 N.L.R.B. 862, 863 n.2 (1988); *Tile, Terrazo & Marble Contractors Ass'n.*, 287 N.L.R.B. 769, n.2 (1987), *enf'd sub nom., U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249 (11th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992).



> of the bargaining unit has expressly repudiated the union. Such direct evidence, however, is nearly impossible to gather lawfully. Thus, the Board's good-faith doubt standard, although ostensibly a highly fact-dependent totality-of-the-circumstances test, approaches a per se rule in application: Withdrawals of recognition will nearly always be found unlawful.

*Id.*[9] *See also NLRB v. Curtin Matheson Scientific*, 494 U.S. at 797 (Rehnquist, C.J., concurring) ("some recent decisions suggest that it [the Board] now requires an employer to show that individual employees have 'expressed desires' to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status.")[10]

[9] This commentator previously wrote, "the Board construes the good faith doubt standard so strictly in the withdrawal of recognition context as to effectively require the employer to prove that the union has in fact lost its majority status." Joan Flynn, *A Triple Standard at the NLRB; Employer Challenges to an Incumbent Union*, 1991 Wis. L. Rev. 653, 690 (1991) (hereinafter *"A Triple Standard"*). Flynn found no indication that "in the polling context . . . the standard is applied any differently than in the withdrawal of recognition context." *Id.* n.250. *See also* James D. Dasso, *Employer Postcertification Polls to Determine Union Support*, 84 Mich. L. Rev. 1770, 1771 and n.12 (1986); Joel B. Toomey, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 Duke L.J. 718 (1981).

[10] In *Liquid Carriers Corp.*, 319 N.L.R.B. 317, 319 n.10 (1995), *enf'd*, 101 F.3d 691 (3rd Cir. 1996), the Board, responding to criticism, stated that it "has never imposed a requirement that there be 'proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit' in order for an employer to establish 'good faith doubt.' " However, the Board adhered to its view that "good faith doubt" means that "the evidence must establish with a reasonable

**B. Polling.**

The Board permits polling during the organizational phase to determine if a majority of employees support the union. "The purpose of the polling in these circumstances is clearly relevant to an issue raised by a union's claim for recognition and is therefore lawful." *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967). As long as the polling conforms to certain procedural safeguards, the Board finds that it does not "interfere with, restrain, or coerce employees" in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). Safeguards for the conduct of such polls are set forth in *Struksnes*.[11]

Once a union has achieved recognition, or asserts a claim that it should be recognized by a successor, a different standard applies. In *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), the Board held that an employer must have good faith doubt, based on objective considerations, as to the union's continuing majority status in order to conduct a poll. In practice, the Board requires proof that a majority of the workers no longer support

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degree of *certainty* that there is an objective basis for doubting that the majority of unit employees desire representation by the union." *Id.* at 320 (emphasis added). It is a contradiction in terms to speak of establishing "doubt" with "certainty."

[11] The safeguards are: (1) the purpose of the poll must be to determine the truth of a union's claim of majority; (2) the purpose must be communicated to employees; (3) assurances against reprisals must be given; (4) the poll must be by secret ballot; and (5) the employer may not engage in unfair labor practices or otherwise create a coercive atmosphere. *Struksnes Construction Co.*, 165 N.L.R.B. at 1063. A poll cannot be taken if a petition for a Board-conducted election is pending. *Id.*



the union. That is the same standard used to determine whether there is sufficient evidence to process an employer-filed decertification petition (RM petition) or to determine whether an employer can lawfully withdraw recognition from a union. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1059 (1989), *remanded as modified*, 923 F.2d 398 (5th Cir. 1991).[12]

**C. Judicial response to the Board's polling standard.**

The Board's polling standard was rejected by the first three Courts of Appeals to consider it. *Mingtree Restaurant v. NLRB, supra; Thomas Industries v. NLRB, supra; NLRB v. A.W. Thompson, Inc., supra.*[13] The standard developed by those courts in effect revitalized the good faith doubt branch of the withdrawal of recognition standard, by allowing the employer to poll when it had reasonable grounds to believe the union had lost majority support, even if that evidence was not sufficient to prove actual loss of majority status.

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[12] When the union already has bargaining rights or a claim to bargaining rights with a successor employer, the employer must give the union advance notice of the poll. *Texas Petrochemicals Corp.*, 296 N.L.R.B. at 1063.

[13] In *Hajoca Corp.*, 291 N.L.R.B. 104 (1988), *enf'd*, 872 F.2d 1169 (3d Cir. 1989), the Board followed its strict standard. The Third Circuit found it unnecessary to address the conflict between the Board's and the Courts of Appeals' standards, since the evidence was insufficient to support a poll even under the courts' standard.

In *NLRB v. A.W. Thompson, Inc., supra,* the Fifth Circuit held, "we are not convinced that an employer may conduct an employee poll only when it has no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition." 651 F.2d at 1144. The court found that the Board's approach "represents, in practical effect, an outright ban on employer-sponsored polls of employee sentiments in regard to a certified union." *Id.* Observing that "the national labor policy favors employee free choice in such matters," *id.*, the court concluded that if an employer has not otherwise engaged in unfair labor practices, or created a coercive atmosphere, it may, after giving notice to the union, "poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal) and if the poll meets the procedural guidelines set out in *Struksnes.*" *Id.* at 1145.

In *Thomas Industries v. NLRB, supra,* the Sixth Circuit adopted the *A.W. Thompson* polling standard. The court rejected the Board's position that in order to conduct a poll, an employer must have objective evidence that over 50 percent of bargaining unit employees have rejected the incumbent union.

> We find the Board's position to be untenable. Under the Board's analysis, an employer would only be allowed to take a poll under circumstances where no poll was necessary; the only value of the poll would be to double check the employer's already sufficient evidence to refuse to bargain.

687 F.2d at 867.



The court further found that the evidence of loss of support should be considered cumulatively, and that the evidence in that case was sufficient to justify the poll. *Id.* The evidence presented included a sharp decline in dues check offs, negative comments from one-third of the employees, and resignations of union officials.[14]

In *Mingtree Restaurant, supra,* the Ninth Circuit agreed with the Fifth and Sixth Circuits. The court rejected the Board's argument that an employer-sponsored poll is defective because it does not have the safeguards of a Board-sponsored election.

> The Board has determined that the *Struksnes* procedures adequately protect employee interests in voting secrecy and assurance against employer reprisal in the organizational stage. Again, we see no reason why [these procedures] would not afford as much protection after the union has been recognized.

736 F.2d at 1298. The court also rejected the Board's argument that an employer-sponsored election usurps a Board function.

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[14] The court stated that Board-conducted decertification elections are preferable to employer-sponsored polls as a means of measuring employee sentiment, but noted a practical difficulty in obtaining such elections: the Board's rule permitting unions to block elections by filing unfair labor practice charges. 687 F.2d at 869, n. 3. In fact, it is easy for unions to delay decertification petitions even with meritless charges. *See Johns-Manville Sales Corp. v. NLRB,* 906 F.2d at 1431, n.9; Dasso, *supra* note 9, 84 MICH. L. REV. at 1782; William J. Rosenthal, *Issues in Decertification Proceedings,* 34 N.Y.U. CONF. LAB. 149, 158-59 (1982).

> After recognition of the union . . . as a practical matter . . . neither employer-petitioned Board elections nor private employer polls will be allowed until the employer first produces other evidence sufficient to permit withdrawal of recognition.

*Id.* The court continued:

> We find it incongruous for the Board to grant the right to conduct polls of union sentiment during the crucial organizational period and effectively deny that right after the union has been recognized. While we appreciate the importance of maintaining stability in the bargaining relationship, we must also weigh the legitimate concern of the employer that it bargain only with the majority union. On balance, we find that polling that adheres to the *Struksnes* safeguards is an adjunct to, rather than a usurpation of, a Board function; it is an objective, minimally disruptive mechanism for obtaining evidence of the level of union support; and it enables the employer to avoid precipitous action, such as the withdrawal of recognition, when only less precise evidence is available.

*Id.*

**D. The Board adheres to its polling standard.**

In *Texas Petrochemicals, supra,* a divided Board panel responded to the courts' criticism and reaffirmed its strict standard. Board Members Cracraft and Higgins explained that the more stringent standard is necessary to achieve



stability and avoid disrupting collective bargaining relationships. Board Chairman Stephens concurred in the result, but agreed with the courts that the standard for polling should be less than the standard for withdrawing recognition. 296 N.L.R.B. at 1065.

On review, the Court of Appeals for the Fifth Circuit refused to alter its view, expressed previously in *NLRB v. A.W. Thompson, supra,* that the Board's use of a single standard for withdrawals of recognition and employer polls was unreasonable. *Texas Petrochemicals Corp. v. NLRB,* 923 F.2d 398, 402 (5th Cir. 1991). The Ninth Circuit has also adhered to its earlier views. *Wagon Wheel Bowl, Inc. v. NLRB,* 47 F.3d 332, 335 (9th Cir. 1995).[15]

The Chief Justice and Justice Blackmun took note of the Board's *Texas Petrochemicals* ruling in *NLRB v. Curtin Matheson Scientific, supra.* The Chief Justice (concurring) observed:

> It appears that another of the Board's rules prevents the employer from polling employees unless it first establishes a good faith doubt of majority status. *See Texas Petrochemicals Corp.,* 296 N.L.R.B. 1057, 1064 (1989) (the standard for employer polling is the same as the standard for withdrawal of recognition). I have considerable doubt whether the Board may insist that good faith doubt be determined only on the basis of sentiments of individual employees, and at the

[15] The Court of Appeals for the Second Circuit also questioned the Board's policy in *NLRB v. Albany Steel, Inc.,* 17 F.3d 564, 571 (2d Cir. 1994) ("We are not the first court to notice the peculiar incentives that the Board's identical standards generate.")

same time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today.

494 U.S. at 797.

Justice Blackmun, dissenting,[16] wrote:

I am also troubled by the fact, noted in the Chief Justice's concurring opinion, that while the Board appears to require that good faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible to amass direct evidence of its workers' views.

494 U.S. at 800. Justice Blackmun continued, in a footnote:

The NLRB has recently reaffirmed its rule that an employer must meet the same good-faith doubt standard in order to poll its employees, petition the Board for an election, or withdraw recognition from the union. *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057, 1064 (1989). If good-faith doubt can be established only by the express statements of individual workers, the employer is placed in a difficult bind. *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (CA9 1984) ("By the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it

[16] Justice Blackmun was the author of the Court's decision in *Fall River Dyeing & Finishing, supra*, which contains a comprehensive review of labor law successorship doctrine.



already had sufficient objective evidence to justify withdrawal of recognition").

494 U.S. at 800, n.3.

**E. The Court of Appeals' decision in this case.**

The Court of Appeals' decision in this case was the first decision by a reviewing court to enforce the Board's standard. The Court of Appeals panel majority found that "Neither the courts' analysis nor the Board's response is entirely satisfactory." (Pet. App. 6). Discussing the Board's reasoning in *Texas Petrochemicals*, the court wrote, "it seems to us inconsistent for the Board to say that RM elections are the preferred method for testing employee support of the union, 296 N.L.R.B. at 1061, and yet maintain the same evidentiary standard for allowing polling." (Pet. App. 7.) Assuming the Board were correct that the same standard should apply to polling and RM elections, the court asked, "How then can the Board justify applying the identical standard to an employer's decision to withdraw recognition, a decision lacking any procedural safeguards?" (Pet. App. 8). Nevertheless, the Court of Appeals panel majority deferred to the Board's standard.

The majority decision provoked an exceptionally vigorous dissent. (Pet. App. 13). As the dissent recognized, the Board found that the employer lacked good faith doubt of the union's majority status despite persuasive evidence to the contrary and, as a result,

concluded not only . . . that the employer committed the unfair labor practice by refusing to bargain with a union that commanded thirteen of the thirty-two votes, but also placed the

> employer under a bargaining order amounting to a bar against decertification of the union with only 40% support.

(Pet. App. 14.)

The dissent continued by remarking that where, as here,

> an administrative agency's application of the law yields a bizarre result . . . that application of the law should be closely scrutinized, particularly when other courts have avoided that result. . . . The Board's rule establishing that an employer cannot conduct a poll to determine majority support unless it already has so much evidence of no majority support as to render the poll meaningless, is just such an application. Three other circuits who have examined this question have unanimously concluded that the Board's rule cannot stand.

(*Id.* at 14-15.)

After reviewing the manner in which the other courts of appeals avoided this "bizarre result" the dissent suggested that "the present case is, if anything, a stronger one for rejecting the Board's approach[.] . . . The emerging bargaining unit at Allentown Mack had never been- . . . sampled for majority support." (*Id.* at 17-18.) The dissent concluded that it was "arbitrary and capricious of the Board to find that the employer committed unfair labor practices in the face of overwhelming and unrefuted evidence that the union lacked majority support, including a poll taken with the utmost safeguards for fairness and objectivity." (*Id.* at 18.)



## II. THE BOARD'S STANDARD IS IRRATIONAL AND CONTRARY TO THE ACT.

### A. The standard of review.

The Board's rules are entitled to deference, provided they are rational and consistent with the Act. *NLRB v. Curtin Matheson Scientific, supra.* In this case, the Board's standard is neither. "Reviewing courts are not obligated to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." *NLRB v. Brown,* 380 U.S. 278, 291 (1965).

### B. The Board's polling standard is irrational.

No one would dispute that it is better for an employer which doubts a union's majority support to act on the basis of an uncoerced, secret ballot poll, than to unilaterally withdraw recognition. The Board, however, irrationally prescribes the same standard for polls as for unilateral withdrawals of recognition. This standard makes it possible to conduct polls only when they are unnecessary, and prohibits them when they would be most useful, i.e., when the employer has objective reasons to believe, but not necessarily conclusive proof, that the union has lost majority support.

The Board responds that the standard for employer sponsored polling should be consistent with the standard

for Board-conducted elections based on employer petitions (RM petitions). *Texas Petrochemicals*, 296 N.L.R.B. at 1060-61. However, the standard for RM petitions is also the same as the standard for unilateral withdrawals of recognition. *United States Gypsum*, 157 N.L.R.B. 652, 655 (1966). "It defies common sense to require an employer to prove that the union has lost its majority status before it can obtain an election designed to test that status." *A Triple Standard, supra* note 9, 1991 WIS. L. REV. at 690. In short, the Board defends one irrational policy by claiming a need to be consistent with another irrational policy.

### C. The Board's polling standard is contrary to the Act.

The poll in this case was found to violate only Section 8(a)(1) of the Act. (Pet. App. 26, n. 9.)

The Board places no precondition on polling during the organizational phase, other than the requirement that the polling be conducted in accordance with *Struksnes* safeguards. On the other hand, the Board strictly limits polling when a union stands to lose bargaining rights. Thus, the polling mechanism is like a ratchet, which advances freely, but moves backwards only with great difficulty.

Under Section 8(a)(1), it is an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."[17] Under

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[17] Section 7 protects only employee rights. Any rights that a union enjoys under Section 7 are derivative. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).



Section 7, the right to engage in collective bargaining, and the right to refrain from collective bargaining, are placed on the same footing. Nothing in Section 7 or Section 8(a)(1) warrants discriminating between polls in which unions stand to gain and polls in which they stand to lose.

Certified unions, are, of course, protected against withdrawals of recognition during the certification year and during the term of any contract reached. *Auciello Iron Works, supra*. After the certification year, a union claiming a right to bargain with a successor employer enjoys no such "conclusive presumption." The presumption that employees of a successor continue to support the union is rebuttable. *Harley-Davidson*, 273 NLRB at 1531.

The Board found in this case that the Company's poll complied with the *Struksnes* and *Texas Petrochemicals* procedural guidelines. In other words, the conduct of the poll did not in any way "interfere with, restrain, or coerce employees." The only problem with the poll was that it confirmed a doubt the Board did not want the employer to be able to prove – that a majority of the employees no longer supported the Union. Yet that fact was "clearly relevant to an issue raised by a union's claim for recognition." *Struksnes Construction Co.*, 165 N.L.R.B. at 1062. As a claimed successor, the Company had a right to withdraw recognition, if a majority of employees no longer supported the union. *Harley-Davidson Transportation, supra*.

In short, the information obtained from the poll was both relevant to the employer and obtained in accordance with all applicable procedural safeguards. There was, therefore, no statutory basis to prohibit it.

### D. The Board's defense of its standard should be rejected.

The Board's fullest defense of its standard appears in *Texas Petrochemicals*. The Board's explanations for employing that test were as follows:

> *Since a poll and a decertification election are similar in purpose and consequences, similar evidence should be required.* 296 NLRB at 1060-61.

According to the Board, a poll and a decertification election are similar in purpose and consequences.

> It would be anomalous to on one hand require an employer to show sufficient objective considerations on which to base a reasonable doubt about an incumbent union's majority support in order to have a formal, Board conducted RM election for the purpose of determining the union's majority support, while, on the other hand permitting that same employer to conduct an in-house, relatively informal poll for the same purpose, with the same serious potential consequences for the union and the employees, on the basis of a significantly less stringent evidentiary predicate, i.e. the courts' "loss of support" standard.

*Id.* at 1060.



That argument should be rejected for several reasons:

First, while a poll and a Board-conducted election are similar in purpose, *they are not similar in consequences.* When a Board-conducted election is held, the union is statutorily barred from seeking another election for one year. NLRA Section 9(c)(3), 29 U.S.C. § 159(c)(3). An employer-sponsored poll, taken to determine if employees no longer support a union, has no such preclusive effect.[18] The union can file an election petition at any time.

Second, while it might make sense to have a similar standard for polls and Board-conducted elections (although they are different), it makes no sense for that standard to be the same as the standard for unilateral withdrawals of recognition. As this case illustrates, if the union loses a poll, the employer must defend its withdrawal of recognition by proving that the Union lacked majority support prior to the poll. Thus, the employer has nothing to gain by ascertaining its employees' views more precisely via a poll. At the same time, an employer which has genuine doubts (but not conclusive proof) that

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[18] If the union wins an employer-conducted poll, the employer is required to recognize the union. *Nationwide Plastics Co., Inc.*, 197 N.L.R.B. 996 (1972). When an employer voluntarily recognizes a union, the Board imposes a bar against decertification for a reasonable period to permit bargaining. *See Dale's Super Valu, Inc.*, 181 N.L.R.B. 698 (1970); *Keller Plastics Eastern*, 157 N.L.R.B. 583 (1966). If an agreement is reached, a contract bar will apply. *See Texas Petrochemicals*, 296 N.L.R.B. at 1061. Thus, the Board would give preclusive effect to employer-sponsored polls, but only if the union wins.

the union has lost support is barred, under the Board's standard, from taking any action.[19]

*Statutory purposes and goals require a high standard.* 296 N.L.R.B. at 1061-62.

The Board argues that "A principal purpose and ultimate goal of the Act is to promote industrial and workplace stability in collective bargaining relationships." *Id.* at 1061. Polls, the Board contends, are "potentially, if not inherently, both disruptive of the collective bargaining relationship between an employer and a union and also unsettling to the employees involved." *Id.* at 1061. Hence, the Board asserts, permitting employer polls would "allow an employer's interest in testing its employees' support for a union to outweigh the statutory goal of stable collective bargaining relationships." *Id.* at 1062 (footnote omitted). The interest of employers in not bargaining with a minority union is adequately protected by the availability of employee-filed decertification petitions (RD petitions), the Board continues. *Id.* at 1062.

Those arguments should be rejected for several reasons.

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[19] The Board's General Counsel has impliedly conceded that the Board's standards in this area are flawed: he recently proposed that the Board prohibit unilateral withdrawals of recognition and reduce the standard for RM petitions to a 30 percent showing of interest. *See* Brief of NLRB General Counsel in *Chelsea Indus., Inc.*, 7-CA-36846, 7-CA-37106 at 8-13, lodged by the United States with the Clerk of the Court on January 22, 1997. That proposal has not been adopted by the Board. In *Lee Lumber and Building Material Corp.*, 322 N.L.R.B. No. 14, 153 L.R.R.M. (BNA) 1159, 1161, n.14 (1996), the Board declined to address that suggestion.



First, as the results of this case make clear, the Board's policy places a higher value on the union's claim to continued recognition than on employee self-determination. The Act, however, gives equal weight to the right to engage in protected activity and the right to refrain from such activity. If stability in collective bargaining relationships were in fact the single "ultimate goal of the Act," the presumption of continued support by a successor's employees should be unrebuttable. The presumption is, in fact, rebuttable, because employee choice is at least as important as stability.

The Act itself makes this clear. The preamble declares its purpose to protect "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing." NLRA § 1, 29, U.S.C. § 151. Section 7, the core of the Act, states that employees shall have the right to bargain collectively through representatives "of their own choosing" and "to refrain from any and all such activities." 29 U.S.C. § 157.

In this regard, the Company is not claiming to be its "workers' champion," *Auciello Iron Works*, 116 S. Ct. at 1760, although in fact its interests and the interests of a majority of its employees coincide. Rather, the Company seeks to protect its own right under the Act not to bargain with a minority union. That this interest coincides with the employees' interest in not being represented by a minority union is no accident – the law commands employers to bargain with representatives chosen by a majority of their employees and prohibits employers

from bargaining with others. *Int'l Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961).[20]

Second, the Board's concern that polls are themselves destabilizing is adequately addressed by the *Struksnes* safeguards and the requirement that the employer have a good faith doubt (even if that doubt is not sufficient to warrant unilateral withdrawal of recognition). No one suggests that employers should be permitted to illegally foment anti-union sentiment and then poll to confirm it. Rather, the question is whether an employer can poll after receiving, in the absence of any unfair labor practice or coercion, objective evidence to support a good faith doubt as to the union's continued majority support. Moreover, the safeguards of *Struksnes* and the advance notice required by *Texas Petrochemicals* assure the union an opportunity to prepare employees for the poll. Ultimately, if the union loses the poll, it is not because the employer has "destabilized" the situation; it is because employees (who are well familiar with the union based on past experience) no longer feel the need for the union's services.

Third, the policy of promoting "industrial stability" is addressed in the successorship context by providing a

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[20] Unlike *Auciello*, this case does not involve a certified union. 116 S. Ct. at 1760. The Union's claim to continued recognition rests solely on a presumption.

Furthermore, given that the poll at Allentown Mack was conducted in accordance with every safeguard against coercion, and the union was rejected, the Board has little basis to claim that it is advancing employee representational interests in this case. Clearly, the Board is, instead, advancing the Union's institutional interests.



presumption of continuing support. *Fall River Dyeing & Finishing*, 482 U.S. at 39-41. The law's solicitude for the union during the "unsettling transition period," however, has its limits. The presumption of continuing support is rebuttable. As Justice Blackmun, author of *Fall River Dyeing & Finishing*, pointed out in *Curtin Matheson*, the Board's standard makes it almost impossible for a new employer to amass the information necessary to make the rebuttal.

Moreover, the presumption of continuing majority status may rest, as in this case, on a weak empirical foundation. *See Fall River Dyeing & Finishing*, 482 U.S. at 58 (Powell, J., dissenting)("from the employee's perspective, there was little objective evidence that the jobs with petitioner were simply a continuation of those at [the predecessor.]") In this case, the old employer was a multinational corporation, while the new employer is an owner-managed fledgling enterprise. Employees accepted a pay cut to take jobs with the new Company (Tr. 340-41), and could have reasonably concluded that they had nothing to gain from putting any pressure on the employer, through collective bargaining and threats to strike. They could, however, obtain an immediate increase in take-home pay by not paying union dues.

Fourth, the Board argues that the availability of employee-filed decertification petitions, which require a 30 percent showing of interest, is adequate to protect employee interests in ridding themselves of a union they no longer support. *Texas Petrochemicals*, 296 N.L.R.B. at 1062. It is doubtful whether the availability of employee-filed petitions is in fact sufficient to protect employee

interests.[21] The Company is not, however, primarily seeking to vindicate its employees' rights (although it clearly has an interest in their well-being), but its own recognized interest in bargaining only with a union chosen by a majority of its employees. *Id.* at 1062.[22]

*The reasonable doubt policy is not anomalous.* 296 N.L.R.B. at 1063.

The Board rejected the courts' criticism that its policy was anomalous because it permitted polling only when it

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[21] Employees must figure out how to file timely and properly supported decertification petitions without assistance from the employer or an organizer. *Shengo Steel Buildings*, 231 N.L.R.B. 586 (1977); *Consolidated Rebuilders Inc.*, 171 N.L.R.B. 1415 (1968). Employees who try to decertify their union are subject to pressure from the union, including the threat of union discipline. *Int'l Molders & Allied Workers Union*, 178 N.L.R.B. 208 (1969), *enf'd*, 442 F.2d 92 (7th Cir. 1971). A decertification petition can be easily blocked by the filing of even meritless unfair labor practice charges. *Thomas Industries v. NLRB*, 687 F.2d at 869, n.3; *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d at 1431 (decertification petition blocked for 9 years). *See generally*, Rosenthal, *supra*, note 14, 34 N.Y.U. CONF. LABOR. at 153-56.

[22] In *Auciello Iron Works, supra*, the Court suggested that an employer with a good faith doubt of a union's majority status could, among other alternatives, bargain with the union while investigating whether the doubts were bona fide. 116 S. Ct. at 1759. In doing so, the employer could avoid the conundrum of learning, after a binding contract had been reached (and a contract bar triggered) that the union lacked majority support. Since it is illegal to interrogate employees concerning their union sympathies, *e.g. Cannon Elec. Co.*, 151 N.L.R.B. 1465 (1965), it would appear that the only – and certainly the best – way for the employer to investigate would be to conduct a secret ballot poll. Yet, under the Board's standard, the employer could investigate only if the results were a foregone conclusion.



was of no value. The Board found that some employers might wish to conduct a poll, even if they already had evidence sufficient to permit a withdrawal of recognition, in order to resolve the issue. "An employer may wish first to poll its employees to obtain more certain, precise information about the union's support than is provided by its own reasonable doubt." 296 N.L.R.B. at 1063.[23]

Perhaps aware that permitting polls during the organizational stage, while banning them outright once a union has gained bargaining rights, would be too obviously one-sided, the Board takes pains to disclaim any intention to outlaw polls to determine support for incumbent unions. "To impose such procedural requirements on in-house employer polls would, in all likelihood, effectively do away with such polls – a result we do not seek." *Texas Petrochemicals*, 296 N.L.R.B. at 1061. Nevertheless, the Board effectively bans polls by permitting them only when they are of no real value, and denying them when they would be of value. The Board's suggestion that employers might wish to conduct polls to verify their already sufficient evidence that the employees no longer support the union is unrealistic. If the union loses the poll, the employer will still have to defend its withdrawal of recognition by proving that it had sufficient evidence, even before the poll, that the union lacked majority support. Under the circumstances, the employer has nothing to gain by taking the poll. *See NLRB v. Albany Steel*, 17

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[23] That would appear to be exactly what the Company did in this case. The Board did not, however, recognize the Company's reasonable doubt as being something different from a head count proving actual loss of support.

F.3d at 571 (observing no employer incentive to request an election).

## III. THE BOARD'S APPLICATION OF ITS STANDARD IS INCONSISTENT WITH BOARD PRECEDENT.

### A. The standard of review.

An administrative agency's application of its rules must be consistent with its own precedent and rulemaking. *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 799, n.2 (Blackmun, J., dissenting). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983)("an agency changing its course must supply a reasoned analysis."); *Calif. v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994)("We therefore may require the agency to provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."), *cert. denied*, 115 S. Ct. 1427 (1995); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

### B. The Board silently abandoned its good faith doubt standard.

As explained previously, the Board's own articulated standard for withdrawal of recognition has two branches: good faith doubt or proof of actual loss of majority status. Although the Board continues to use the phrase, good faith doubt, its application of that test has effectively abolished doubt as a standard. Instead, the Board requires proof, via a head count, that a majority of



employees do not support the union. By contrast, the standard adopted by the Fifth, Sixth and Ninth Circuits gives effect to the Board's good faith doubt standard, by allowing polling when there is sufficient evidence to reasonably doubt the union's continuing majority support, even if the evidence is not sufficient to prove actual loss of support.

The Board has long held that an employer can rebut the presumption of majority support "either by showing that the union in fact lacks majority support or by demonstrating a sufficient objective basis for doubting the union's majority status." *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 787. The two branches of this standards are supposed to be different. *See e.g., Stormor, Inc.*, 268 N.L.R.B. 860, 866-867 (1984)(employer need not show actual loss of majority support to prove good faith doubt). The good faith doubt test is not supposed to require proof via a head count, but is supposed to be based on circumstantial evidence, considering the totality of the circumstances. *Celanese Corp.*, 95 N.L.R.B. at 673.

As the Board's decision in this case illustrates, the Board has effectively abolished the good faith doubt branch of the standard without admitting it. However, the Board's effective abandonment of the good faith doubt standard has not gone unnoticed.

> [B]y requiring direct proof of employee dissatisfaction, the Board limits the availability of the good faith doubt defense to instances where dissatisfied employees come forward and identify themselves in sufficient numbers to constitute an absolute majority. Such an approach

> leaves little of the good faith doubt rule, effectively collapsing it into the proof in fact rule.

*Johns-Manville Sales Corp.*, 906 F.2d at 1432-33. *See NLRB v. Curtin Matheson Scientific*, 494 U.S. at 797 (Rehnquist, C.J., concurring); *Hiding the Ball*, 75 B.U.L. Rev. at 394.

The Board has never overruled the good faith reasonable doubt test, and its failure to apply it to employee polling, for that reason, is an impermissible departure from its own precedent. *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 799, n.2 (Blackmun, J., dissenting). If, as the Board asserts, good faith reasonable doubt is the test applicable to polling (as well as withdrawals of recognition), it should not have insisted on a strict head count. The Company should have been permitted to conduct a poll based on evidence raising reasonable doubts that a majority of employees continued to support the Union, even if that evidence did not amount to proof of actual loss of majority status.

## IV. MEASURED AGAINST THE CORRECT STANDARD, THE COMPANY HAD A REASONABLE, OBJECTIVE BASIS FOR CONDUCTING A POLL.

Neither the Board nor the Court of Appeals considered the evidence under a standard requiring anything less than strict proof that a majority of employees individually expressed views in opposition to the Union.[24]

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[24] The ALJ expressed doubt that the evidence would satisfy the courts' standard, but made no effort to apply that standard. "As this standard is not the standard used by the Board, and as I am bound to follow Board law, the evidence will not be further discussed in relation to the courts' standard." (Pet. App. 53, n.7). While the Board, in a footnote, attempted to elevate the ALJ's "doubt" to an alternative finding that the evidence was insufficient under the courts' standard, the Board treated the head count, rather than the totality of the evidence, as determinative. (*Id.* at 26, n.9.). The Court of Appeals made no ruling under the less strict standard. *Compare, Hajoca Corp. v. NLRB*, 872 F.2d at 1169.



*Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) ("We cannot accept the Board's conclusion, because it 'rest[s] on erroneous legal foundations.' ") Measured against a reasonable doubt standard, Allentown Mack had sufficient evidence to justify its poll.

Allentown Mack hired 32 employees. Six or seven of those employees made statements that even the Board accepted as evidence they no longer supported the union.

Mohr was shop steward for the service department, in which 23 of the Company's 32 employees worked, and was a member of the Union's bargaining committee. He accurately predicted that "with a new company, if a vote was taken, the Union would lose and that it was his feeling that the employees did not want a union." (Pet. App. 53.)

The Board discounted Mohr's statement on the grounds that Mohr was referring to the seller's existing employee complement, not the purchaser's complement, which included 32 of the seller's 45 employees. That is simply illogical. If union support carries forward based on a representative complement of employees, *Fall River*

*Dyeing & Finishing, supra,* non-support should also carry forward on the same basis.[25]

The Board also discounted Mohr's statement on the grounds that he was shop steward only for the service department, although that department contained 23 of the new Company's 32 employees, and that Mohr "had no more basis than any other employee for reporting the union sentiment of employees in the parts department." (Pet. App. 24.) In so finding, the Board overlooked the fact that the employer had a small workforce and that Mohr served on the Union's negotiating committee in both the most recent contract negotiations and in bargaining with the seller over the effect of the sale. These roles put him in a good position to assess (accurately, as it turned out) the sentiment of the workforce.[26] *American Mirror Co.,* 277 N.L.R.B. 1626 (1986)(Employer lawfully polled employees after receiving signed rejections of union from minority of employees and statements from others "that if an election were held a majority of employees would reject union representation."), *Naylor, Type & Mats,* 233 N.L.R.B. 105 (1977)(employer permitted to rely on statements by employees concerning union sentiment in departments).

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[25] As the dissent in the Court of Appeals pointed out, the emerging bargaining unit at the Company was smaller than the predecessor unit and had never been sampled for majority support. (Pet. App. 18).

[26] The Court of Appeals approved the ALJ's characterization of Mohr's statement as an "unverified assertion." (Pet. App. 11, 55). The poll, of course, was the only method available to the Company to verify the assertion, which turned out to be correct.



The Board's treatment of other evidence was also unrealistic and result-oriented.

Ridgick stated that as long as the new Company would treat them right, there was no need for the Union. The Board discounted this statement because Ridgick was a manager (interviewing for a bargaining unit job), as if that automatically meant that Ridgick was insincere. (Pet. App. 48.) However, Ridgick questioned management about decertifying the Union in 1986 when he was a member of the bargaining unit, which suggests that his views were consistent. In any event, the Board's speculation about the sincerity of Ridgick's comment is unwarranted – the question should not be whether Ridgick's statement proved conclusively that he did not support the Union, but whether it raised a reasonable doubt.[27]

Wehr stated in July 1990, that if Dwyer were elected principal of a new company, "we didn't have to have a union because we didn't need one." (Pet. App. 49.) The Board refused to count Wehr because he quit on January 23, 1991, before the January 25, 1991 letter to the Union. On the other hand, Zoltack's statement that the Union was a waste of $35 was not counted because he was hired in February, before the poll but after January 25, 1991.[28]

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[27] "[T]he burden upon the employer here was not to demonstrate 100% assurance that a majority of the bargaining unit did not support the union, but merely 'reasonable doubt' that they did so." *NLRB v. Curtin Matheson Scientific,* 494 U.S. at 812 (Scalia, J., dissenting). *See also NLRB v. Oil Capital Electric, Inc.,* 5 F.3d 459 (10th Cir. 1993)(evidence should be viewed from employer's perspective).

[28] Thus, being on the payroll on January 25, 1991 was the critical date for having one's views considered, regardless of

Marsh said he was not being represented for the $35 he was paying. The Board discounted Marsh based on the improbable speculation that his statement "seems more an expression of a desire for better representation than one for no representation at all." (Pet. App. 51.) "But what the employer is required to have a good-faith doubt about is majority support, not for 'union representation' in the abstract, but for representation *by this particular complainant union, at the time the employer withdrew recognition from the union.*" *Curtin Matheson Scientific*, 494 U.S. at 808 (Scalia J., dissenting)(emphasis in original).

Bloch, a night shift employee, told the Company that the entire night shift (5 or 6 employees) did not want the union. The Board counted Bloch as anti-union, but gave no weight to his statement concerning other employees, on the grounds that there was not a sufficient foundation. (Pet. App. 51). Taken in context, however, it adds to the Company's reason for doubting the Union's continuing support. *American Mirror Co., supra; Naylor, Type & Mats, supra.*

The Board viewed each piece of evidence in isolation, rather than combining them to see the big picture. It grudgingly counted an employee as opposed to the Union only if it could find no excuse for questioning the reliability of the employee's statement. While the Court of Appeals sustained the Board's factual findings, it, like the Board, viewed the evidence through the filter of the Board's strict standard. As the dissent in the Court of

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prior or subsequent service. There is no reason to treat January 25, 1991 as the critical date; it merely marked one event (the letter) in the "totality of the circumstances."



Appeals found, when the evidence is viewed under a standard that permits polling based on substantial, objective evidence of a loss of union support, there was sufficient evidence to warrant a poll.

## CONCLUSION

For these reasons, Allentown Mack respectfully requests that the Court reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and remand with instructions to deny the Board's application for enforcement.

Respectfully submitted,

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